

# The protection of labour rights in professional football under the ICESCR

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## Introduction

The Fédération Internationale de Football Association (FIFA) – the governing body of association football – is an association domiciled in Switzerland, yet it has an influence on the realisation of human rights of individuals all over the world, including football players, coaches, club officials and owners, intermediaries, referees, sport mega-event workers etc. This is an organisation like no other and does not compare easily to transnational corporations or non-governmental organisations. FIFA sets both the laws of the game as well as various organisational regulations regarding the transfers of football players and their status as employees, professional licenses for clubs, referees, coaches and intermediaries. These norms apply directly at the international level as well as at domestic level, through their implementation by national football associations and are enforced through a system of disciplinary sanctions. FIFA also established a system of private dispute resolution, which is mandatory to almost all its stakeholders. Taking into account its monopolistic position, it is impossible to operate in professional football outside the scope of FIFA's jurisdiction and the exclusion from its competitions – due to lack of compliance with its regulations – can effectively lead to an end to a professional career. Therefore, it is reasonable to conclude that the authority exercised by FIFA resembles that of a state. [Considering the importance of work and the right to work for realizing other human rights, and the fact it forms an inseparable and inherent part of human dignity](#), it is essential to ensure that the fundamental labour rights of the stakeholders in professional football are protected, and that in the case of a violation, appropriate remedies exist and be accessible. In this blog, I argue that the global operations of FIFA affecting the labour rights of individuals fall under the scope of the [International Covenant on Economic, Social and Cultural Rights](#) (hereinafter “the Covenant” or “the ICESCR”) and that FIFA's responsibility for potential violations of these rights can be engaged. It could also form the basis for Switzerland's international legal responsibility for a possible violation of a state's obligation to protect.

## FIFA and labour rights

The Covenant is one of the three core human rights documents constituting the International Bill of Rights and the main source of universal human rights law regarding economic, social and cultural rights. In Articles 6, 7 and 8, the Covenant proclaims the protection of labour rights in three different dimensions. Article 6 formulates the general dimension of the right to work, including the right of every person to gain his living by work which he freely chooses or accepts (the right to

access to work), the right to freedom from coercion to work (or freedom from compulsory labour) and the right to freedom from unreasonable deprivation of work. The right to work is then developed and specified in Article 7 of the Covenant, including the right of everyone to enjoy fair and favourable working conditions. The abovementioned provision indicates specific conditions that the work referred in Article 6 must meet. The third dimension is the collective dimension, which was expressed in Article 8 of the Covenant, formulating rights related to trade unions.

Although the profession of a football player, coach, intermediary, official etc. is generally freely chosen, the monopolistic position of FIFA and the scope of its regulations strongly affect the enjoyment of their labour rights. FIFA unilaterally regulates the access to and regulation of professions such as coaches and intermediaries. It also created a transfer system which allows football players to change their workplace (football club) only twice a year, during the “transfer periods”. Under certain circumstances a transfer of a young player requires a payment of a training compensation to his former club, even if the player is a free agent. This may prevent him from signing a contract with the new club. One of the major principles of professional football is the principle of contractual stability, which allows for suspending or banning a footballer who decides to prematurely terminate his professional contract. Most of the transnational labour disputes are referred to FIFA’s judicial bodies and the Court of Arbitration for Sport. FIFA – working through its judicial and disciplinary bodies – can also exclude an individual from exercising his or her profession, either permanently or temporarily in case of violations of its rules. This may deprive an individual the access to work, which is protected under the Covenant.

Some of these regulations have a justified and legitimate purpose, such as the protection of fair sport competitions or support for youth training clubs or quality control of professional coaches and intermediaries. FIFA’s authority to set these rules derives from its autonomy, which on the other hand has its legal source in the freedom of association, a human right protected under international human rights law (e.g. Article 22 of [the International Covenant on Political and Civil Rights](#)). The existence of a legitimate and justified purpose of certain regulations of FIFA and their proportionality with regard to the restrictions of labour rights of individuals affected by these regulations should be however subject to the control by a competent authority.

## **Activities of FIFA and obligations resulting from the ICESCR**

The Covenant is [a public international law treaty](#) and therefore only states are parties to it and direct addressees of its provisions . However, the concluding observations of the UN Committee on Economic, Social and Cultural Rights (“the Committee”) reveal that it has been regularly presented with situations in which corporate activities have negatively affected the economic, social and cultural rights of individuals. This – according to the Committee – can be a result of a State’s failure

to ensure their compliance with internationally recognized human rights norms and standards.<sup>[1]</sup>

In addition, the Committee regularly comments on the obligations of States regarding the activities of business entities, including an obligation to effectively protect individuals from infringement of their rights by third parties, through the adoption of legislative, administrative, educational and other appropriate measures, and to provide victims of such abuses with access to effective remedies ([GC No. 24, 34-35](#)).

According to Article 2 Section 1 of the ICESCR, it is possible to establish that the State will be in violation of its obligations either when it does not take measures, which should be taken immediately (independent of its resources) or when it does not take other necessary measures, which rely on the existence of the State's resources. According to the [Maastricht Guidelines on Violations of Economic, Social and Cultural Rights](#), *"In determining which actions or omissions amount to a violation of an economic, social or cultural right, it is important to distinguish the inability from the unwillingness of a State to comply with its treaty obligations"* ([p. 13](#)). The burden of proving the inability to carry out obligations for reasons beyond its control is on the State.

Situations in which the realisation of human rights is hindered by the activities of non-State actors should be assessed as a direct violation of the rights of individuals that is committed by these entities. Normally, this would not lead to holding the State parties directly internationally responsible ([GC No. 24, 15](#)). However, in certain circumstances a violation of a right of an individual by a private entity could be qualified as a State party's violation of a Covenant obligation. According to the Committee, this could happen when a violation perpetrated by a private entity results from a failure by the State to take reasonable measures that could have prevented the occurrence of the event. The State can be held responsible even if other causes have also contributed to the occurrence of the violation and even if the State had not foreseen that a reasonably foreseeable violation would occur ([GC No. 24, 32](#)). In case of organizations that operate globally, just like FIFA, affecting individuals all over the world, an important question arises concerning whether the states have responsibilities regarding foreign activities of private entities domiciled under their jurisdiction?

According to the [ICESCR General comment No. 24 \(2017\)](#), obligations of State parties go beyond their borders, and they are required to take necessary steps to prevent human rights violations perpetrated abroad by corporations domiciled in their territory and/or jurisdiction ([GC No. 24, 26](#)). The Committee also stated that *"Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory"* ([GC No. 24, 28](#)). Therefore, State parties should also introduce appropriate measures to ensure that non-State actors under their jurisdiction are accountable for violations of rights of individuals and that

victims have an access to a remedy ([GC No. 23, 70](#)). This applies in particular to Switzerland as a State party to the ICESCR and seat of FIFA.

## Possible remedies and complaints mechanisms

### Right to an effective remedy

In the General Comment No. 9, the Committee explains that questions relating to the domestic application of the Covenant must be considered in light of two principles of international law. The first, as reflected in Article 27 of the [Vienna Convention on the Law of Treaties of 1969](#), is that “[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”, which means that States should modify their domestic legal order as necessary in order to give effect to their treaty obligations ([GC No. 9, 3](#)). The second principle, as reflected in Article 8 of the [Universal Declaration of Human Rights](#), is that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” ([GC No. 9, 3](#)). The Covenant contains no direct or explicit provision obliging State parties to provide a judicial remedy. Nevertheless – according to the Committee – a State party seeking to justify its failure to provide any domestic legal remedies for the violation of rights would need to show either that such remedies are not “appropriate means” within the terms of Article 2.1 of the Covenant or that they are unnecessary ([GC No. 9, 3](#)).

Furthermore, the Committee indicated in [General Comment No. 24](#) that State parties must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability. Full realization of the Covenant rights require that this should preferably take the form of ensuring access to independent and impartial judicial bodies, as other means of ensuring accountability could be rendered ineffective if they are not reinforced or complemented by judicial remedies ([at 39](#)). Victims of these violations must have prompt access to an independent public authority, which must have the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done ([at 41](#)). Therefore, although non-judicial remedies should also be perceived as an important tool for redress, a possibility to access a court of law is a prerequisite to secure the rights enshrined in the Covenant.

### Right to an effective remedy for violation of Covenant rights under Swiss law

Although theoretically the Swiss legal system provides remedies for victims of infringements of internationally recognized human rights, it could be difficult to file a claim against sports governing bodies due to an alleged violation of rights protected under the ICESCR. The Swiss Federal Supreme Court delivered [an opinion](#) arguing that provisions of Articles 6-15 of the Covenant form guiding ideas, limited to imposing objectives on States to be attained in various policy fields and that they generally do not have the character of directly applicable norms.<sup>1)</sup> Federal Supreme Court, judgement of 20 November 1995, BGE 121 V

229, E. 3a, p. 232. This view was strongly criticized twice by the Committee in [1998](#) and [2010](#) in its concluding observations to the reports submitted by Switzerland under articles 16 and 17 of the Covenant. The Committee expressed its regret regarding Switzerland's persistent position that the provisions of the Covenant merely constitute programmatic objectives and social goals rather than legal obligations. It pointed out that this would lead to a conclusion that some of the Covenant provisions could not be given effect in the domestic legal order and could not be directly invoked before domestic tribunals and courts of the State party ([Concluding Observations, Switzerland, E/C.12/CHE/CO/2-3, 2001](#), § 5.). The Committee recommended that Switzerland:

1. adopts a comprehensive legislation giving effect to all economic, social and cultural rights throughout the country;
2. establishes an effective mechanism to ensure the compatibility of domestic law with the Covenant; and
3. guarantees effective judicial remedies for the violations of the rights enshrined in the Covenant.

In this regard, the CESCR drew the attention of Switzerland to its [general comments No. 3 \(1990\) on the nature of States parties' obligations](#) and [No. 9 \(1998\) on the domestic application of the Covenant](#). The aforementioned general comments state that the Covenant norms must be recognized in appropriate ways within the domestic legal order, which requires appropriate remedies to be available to any aggrieved individual, as well as appropriate means of ensuring governmental accountability ([GC No. 9, 2](#)). According to the Committee, rights protected under the Covenant could be considered both justiciable and self-executing ([GC No. 9, 10f.](#)). Whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary ([GC No. 9, 9](#)).

## **Complaints mechanism under the ICESCR.**

The Covenant itself offers a mechanism, which allows victims of ESC rights violations to file communications (complaints) to the Committee. This mechanism was established under the Optional Protocol to the Covenant, and it binds only States that ratified it. The Committee has no jurisdiction to receive communications against non-State actors, and therefore it would be impossible to file a communication directly against FIFA, but it would be possible to file a communication regarding its activities in the context of a violation of Switzerland's obligation to protect. It is important to underline that the individual filing a communication does not have to be a citizen of the State whose actions or omissions are petitioned. This makes this procedure suitable regarding human rights violations perpetrated by transnational corporations and organisations, such as FIFA. Regrettably, Switzerland is not a party to the Optional Protocol, and therefore an individual whose Covenant right was violated by actions or failures to act by Swiss authorities has no international forum for filing a complaint and seeking redress.

# Conclusions

An analysis of the Covenant provisions as well as general comments and concluding observations of the Committee shows that the Covenant is a legal document that could be invoked by individuals claiming that their labour rights were harmed by activities of FIFA. Although the football governing body could not be held directly responsible for alleged violations, the Covenant puts a legal obligation to control its activities – both domestic and extraterritorial – on Switzerland. The Covenant assigns an obligation for State parties to conform their legal systems with its provisions and to provide individuals with judicial remedies. It also provides a complaints mechanism of its own. The proper international legal mechanism of rights protection is in place. The question remains whether Switzerland will decide to fully implement it.

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[1] see [Concluding Observations, Germany, E/C.12/1/ADD.68, 2001, § 19, 21 and 39](#); [Concluding Observations, Chad, E/C.12/1/TCD/CO/3, 2009, § 17](#); [Concluding Observations, Hungary, E/C.12/HUN/CO/3, 2008, § 34](#); [Concluding Observations, Angola, E/C.12/AGO/CO/3, 2008, § 17](#); [Concluding Observations, Solomon Islands, E/C.12/1/Add.84\(2002\), § 19](#).

## References

- 1. Federal Supreme Court, judgement of 20 November 1995, BGE 121 V 229, E. 3a, p. 232.

